

so would, in my opinion, go against the legislative intent and scheme. I, however, express no considered opinion, as indeed I am not called upon to do so, on the tenability of the claim. It may, however, be stated that, as contended by Shri Awasthy, case for exemption has to be made out by the assessee on whom the onus lies and exemptions from taxes have also to be construed liberally in favour of the revenue and against the tax-payer; they attract a rigid construction against the claimant and in favour of tax-payer. The contention pressed on behalf of Shri Sikri that charitable nature of the exemption claimed is apparent on the face of the record is difficult to uphold because it is a matter to be determined on the facts and circumstances of each assessment.

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In the end, Shri Sikri has half-heartedly thrown a suggestion that the petitioner is in any case a local authority but this contention was not persisted in.

For the foregoing reasons, this petition fails and is hereby dismissed, but with no order as to costs.

MEHAR SINGH, J.—I agree.

Mehar Singh, J.

B.R.T.

APPELLATE CIVIL

Before Prem Chand Pandit, J.

SITA RAM,—Appellant

versus

JOGINDER KUMAR AND OTHERS,—Respondents.

First Appeal From Order No. 127 of 1961.

Partition Act (IV of 1893)—S. 7—Code of Civil Procedure (V of 1908) Order 21, Rule 89 Whether applicable—Petitioner making a statement before the sale that he was unable to buy the property—Whether estopped from applying for setting aside the sale—Only five per cent of the

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sale price deposited and not the sale price—Whether sale can be set aside.

Held, that by virtue of the provisions of sub-clause (h) of section 7 of the Indian Partition Act, 1893, the provisions of the Code of Civil Procedure, as far as practicable, will apply to auction-sales of properties held under section 2 of the Act, because no rules have been framed by the High Court under the Partition Act.

Held, that the provisions of Order 21, Rule 89, C.P.C., relate to the setting aside of a sale by any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person, where immovable property has been sold in execution of a decree. An order to sell the property under section 2 of the Partition Act amounts to a decree within the meaning of section 2 of the Code of Civil Procedure by virtue of section 8 of the Partition Act. The property shall thus be deemed to have been sold in execution of a decree and since the petitioner had an interest in the same both at the time of sale and at the time of making the application under rule 89 of order 21, the provisions of this rule become applicable.

Held, that if the provisions of Order 21, rule 89 of the Code of Civil Procedure give the petitioner a right to purchase the property after getting the sale set aside, though on certain conditions, it cannot be said that he was estopped from doing so, because he had previously made a statement that he was not prepared to purchase the same as there can be no estoppel against the statute.

Held, that a perusal of the provisions of Order 21, rule 89 of the Code, would show that the petitioner had to deposit five per cent of the purchase money and also the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. In this case no amount could have been specified in the proclamation of sale, because the amount for the recovery of which the sale was ordered could be determined only after the property had been sold. The petitioner knew the sale price before he made the application under Order 21, Rule 89, C.P.C., but did not deposit the sale price within 30 days' and only

deposited 5 per cent of it. The auction sale could not, therefore, be set aside as the provisions of Order 21, Rule 89, C.P.C., had not been complied with.

First appeal from the order of the Court of Shri Harish Chander Gaur, Sub-Judge, 1st Class, Amritsar, dated the 13th May, 1961, dismissing the application, under order 21, Rule 89, Civil Procedure Code, for setting aside the sale of House No. 1256/12, on the deposit of 5 per cent of the sale price.

ROOP CHAND, ADVOCATE, for the Appellant.

H. L. SARIN, ADVOCATE, for the Respondent.

JUDGMENT

PANDIT, J.—Two houses Nos. 1256 and 1257 situate in Amritsar City belonged jointly to the parties to this litigation. A suit for partition of this property by metes and bounds was filed, which resulted in a preliminary decree on 27th February, 1959. Appeal against the same was also dismissed by this Court on 9th November, 1960. A Local Commissioner was appointed to effect the partition, but he, however, reported that the houses could not be partitioned by metes and bounds. Consequently, on 23rd January, 1961, the learned Subordinate Judge ordered that this property be auctioned under the provisions of section 2 of the Partition Act, 1893, and the proceeds thereof be divided amongst the various co-owners in accordance with their shares. It may be mentioned that on this very date Sita Ram, one of the co-owners, refused to purchase the houses and stated that they might be auctioned. These houses were put to auction and house No. 1266 was purchased by Aya Singh, for Rs. 5,750 and the other by Smt. Pushpa Rani. The sale in favour of Smt. Pushpa Rani was confirmed on 2nd May, 1961 and there is no dispute with regard to this house. On 14th March, 1961, Sita Ram, filed an application under Order 21, Pandit. J.

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rule 89, Civil Procedure Code, praying that he be allowed to purchase house No. 1256, its sale be set aside and he be permitted to deposit five per cent of the sale price. The Court permitted the deposit of this amount and notice of this application was given to the auction-purchaser who opposed the same contending that the provisions of Order 21, rule 89, did not apply to the facts of this case that Sita Ram, having given his consent to the auction could not object to it; and that since the applicant did not deposit the entire amount as contemplated by the provisions of Order 21, rule 89, Civil Procedure Code, his application was liable to be dismissed.

The following two issues were framed in this case:—

- (1) Whether the sale of the property in favour of Aya Singh, is liable to be set aside?
- (2) Whether Sita Ram, has a *locus standi* to file the present application?

The Subordinate Judge found that although Sita Ram had *locus standi* to file the present application for setting aside the sale under Order 21, rule 89, Civil Procedure Code, yet the sale of the house in favour of Aya Singh, was not liable to be set aside, because Sita Ram had not deposited the entire sale-money and had only deposited five per cent of the same. Moreover, he had already waived his right, because he had previously made a statement to the effect that he was not willing to purchase this house. On these findings, the application was dismissed. Against this decision the present appeal has been filed by Sita Ram.

A Division Bench of this Court in *Hukam Chand v. Harish Chander* (1), has held that a person aggrieved by an order declining to set aside a sale under the

(1) I.L.R. 1959 Punj. 525—1958 P.L.R. 802.

Partition Act has no right to prefer an appeal under Rule 1 of Order 43 of the Code of Civil Procedure. In view of this decision, the present appeal is not competent. Faced with this situation, learned counsel for the appellant submitted that this appeal should be treated as a revision under section 115 of the Code. Learned counsel for the respondents could not say as to why it should not be treated as such. I would, therefore, treat this memorandum of appeal as a petition for revision.

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The first question for decision in this petition is as to whether the provisions of the Code of Civil Procedure apply to the present case.

As already mentioned above the house in dispute was ordered to be auctioned under the provisions of section 2 of the Partition Act, 1893, because the Local Commissioner appointed to effect its partition by *metes and bounds* under the preliminary decree was unable to do so. Section 7 of the Partition Act is in the following terms:—

“S. 7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:—

“(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar.

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such

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rules are made, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.”

It is apparent that by virtue of the provisions of sub-clause (b) of this section, the provisions of the Code of Civil Procedure, as far as practicable, would apply to the present case, because, admittedly, no rules have been framed by the High Court under the Partition Act.

The next question that falls for determination is whether the provisions of Order 21, rule 89, Civil Procedure Code, apply to the present proceedings.

Order 21, rule 89, Civil Procedure Code, as applicable to Punjab, is in the following terms:—

“R. 89(1) Where immovable property has been sold in execution of a decree, any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person, may apply to have the sale set aside on his depositing in Court,—

- (a) for payment to the purchaser a sum equal to five per cent of the purchase-money, and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

- (2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.
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- (3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale”.

It is clear that these provisions relate to the setting aside of a sale by any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person, where immovable property has been sold in execution of a decree. In the present case, the property was ordered to be sold under the provisions of section 2 of the Partition Act and by virtue of section 8 of this Act, such an order of sale would be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure. So, this property had been sold in execution of a decree, and admittedly, the petitioner had an interest in the same both at the time of sale and at the time of making the application under rule 89 of Order 21. Therefore, the provisions of this rule are attracted in the present case.

The third question arises as to whether the petitioner had waived his right to purchase the property when he had made a statement on 23rd January, 1961 before the sale to the effect that he was unable to buy the same.

It is undisputed that there can be no estoppel against the statute. If the provisions of Order 21, rule 89 of the Code give the petitioner a right to purchase the property after getting the sale set aside, though on

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certain conditions, it cannot be said that he was estopped from doing so, because he had previously made a statement that he was not prepared to purchase the same.

The fourth and the last question for decision is whether the petitioner had complied with the provisions of Order 21, rule 89 of the Code, so as to entitle him to get the sale in favour of Aya Singh set aside.

A perusal of the provisions of Order 21, rule 89 of the Code, would show that the petitioner had to deposit five per cent of the purchase money and also the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. In the present case, no amount could have been specified in the proclamation of sale, because the amount for the recovery of which the sale was ordered could be determined only after the property had been sold. This amount came to Rs. 5,750 when Aya Singh, purchased this house on 15th February, 1961 and this fact was within the knowledge of the petitioner, when he filed the present application on 14th March, 1961. The petitioner had, thus, to deposit five per cent of the purchase money and also the sum of Rs. 5,750. Admittedly, he deposited only five per cent of the purchase money and not the sum of Rs. 5,750 within 30 days as provided in Article 166 of the Indian Limitation Act. Under these circumstances he did not comply with the provisions of Order 21, rule 89, Civil Procedure Code, and the auction-sale in favour of Aya Singh could not therefore, be cancelled.

The result is that this petition fails and is dismissed. In the circumstances of this case, however, I will leave the parties to bear their own costs in this Court as well.

B.R.T.